

BOARD OF APPEALS CASE NO. 4829

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BEFORE THE

APPLICANT: Courtland Hardware

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ZONING HEARING EXAMINER

**REQUEST: Appeal of Administrative
Decision and interpretation regarding
outside storage in the B1 District;
2729 Fallston Road, Fallston**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 8/12/98 & 8/19/98

HEARING DATE: October 19, 1998

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Record: 8/14/98 & 8/21/98

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Courtland Hardware, appeals a decision of the Zoning Administrator pursuant to Section 267-7(E) of the Harford County Code and seeks an interpretation of Section 267-39(C)(6)(a) of the Code.

The subject property is located at 2729 Fallston Road, Fallston, Maryland 21047 and is more particularly identified on Tax Map 47, Grid 1B, Parcel 405. The subject property is a retail hardware store located within the Cross Roads Station. The total acreage of the Cross Roads Station shopping center is 6.10 acres, is zoned B1 and is located entirely within the Fourth Election District.

The facts of this case are undisputed. Courtland Hardware (sometimes referred to herein as "Courtland") has operated a retail hardware store at this location since 1989. As part of its operations, Courtland displays certain items outside of the store on the sidewalk. Each of the items is offered for sale and unsold items are moved indoors at night. The types of items displayed are seasonal in nature. During the Spring and Summer, Courtland displays lawn and garden equipment which may include tractors, mowers, power rakes, shovels, etc. During the colder months snow blowers, chippers and the like will be displayed on the sidewalk. According to each witness, outside display occurs on virtually every business day during each business hour, although it was agreed that the items on display change due to sale, season or special promotions.

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It was also undisputed that hardware stores in Harford County generally display similar items on the outside areas of their retail establishments and this appears to be a normal incidence of the hardware business (Applicant's Exhibit 18). Notwithstanding that outside storage of items displayed for sale is normally and generally associated with the retail hardware business, Harford County, pursuant to a complaint filed against Courtland, on April 3, 1998, gave Courtland a Notice of Violation, alleging 6 (six) counts of a zoning violation related to the storage of outside materials (Attachment 1 to Staff Report and Applicant's Exhibit 16). Courtland received a similar Notice of Violation on November 26, 1991. It appeared from the testimony that a compromise was reached between Courtland and the Department regarding that violation. The Applicant agreed not to store display items in the fire lanes or handicap areas, however, Courtland was not prohibited from displaying items outside as a result of the compromise.

Applicant's Exhibit 12 is a letter from Patricia Barth (Department of Planning and Zoning) to Richard Thomas (owner of Courtland) which relates to the 1997 complaint and inspection which ultimately led to the Notice of Violation of April 3, 1998. In that letter, the Department related to the Applicant the position of the Department regarding outside storage. Patricia Barth stated, "We believe that the allowable "incidental" display and storage would not encompass the amount of merchandise observed by our inspector on the sidewalk, such as wood pellets, bags of concrete, utility carts, tractors, tomato cages, hose reels, patio furniture, fertilizer spreaders, tillers, leaf vacuums, patio chairs, wheel barrels, storage containers, mulch, bags of sand and potting soil, and other items. Also, as we explained in the 1991 case, the sidewalks, handicapped ramps, fire lanes and designated parking areas must be kept free and clear of encumbrances which prevent or hamper accessibility.

The Department will accept one example of a specific item displayed or stored outside is incidental storage or display as permitted, however, more than one example of the same item will be considered a violation of both the Shopping Center approval and the Zoning Code requirements." (Emphasis added)

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The Applicant appeals and seeks an interpretation of the Harford County Code.

Section 267-39(C)(6)(a) of the Harford County Code stipulates the following use limitation:

“Enclosed building. All uses permitted, except secondhand merchandise shops in a B3 District, shall be conducted within an enclosed building, except parking, loading, unloading, incidental storage and display, or as otherwise permitted. Secondhand merchandise shops in a B3 District shall be permitted to conduct such uses outside of the building between the hours of 8:00 a.m. and 5:00 p.m.”

The question presented to the Hearing Examiner is whether the particular outside storage of display items engaged in by Courtland Hardware is “incidental” and thus, permitted or, in the alternative, whether the storage is not “incidental” and thus prohibited by the Harford County Code. The Hearing Examiner notes at the onset, that the Harford County Code does not provide a definition of “incidental” or “incidental use” anywhere in the Code. It is also important to note that neither the Code nor the Zoning Administrator take the position that outside storage is prohibited, indeed, both the Code and the Department would allow such outside storage provided that it is “incidental” to the use.

In addition to the provisions of Section 267-39(C)(6)(a) noted above, Section 267-26(E)(1) states:

“Incidental repair facilities and outside storage of goods normally carried in stock, used in or produced by the business or industrial use, provided that no storage is within ten (10) feet of any side or rear lot line, all storage is effectively screened from any adjacent residential use or district and such use is not prohibited under the applicable district regulations of this Part 1.”

The commonly understood rules of statutory construction dictate that when there is no ambiguity or obscurity in the language of the statute, there is no need to look elsewhere to ascertain the intent of the legislative body. Montgomery County v. Buckman, 333 Md. 516, 523, 636 A.2d 448 (1994). In the absence of an ambiguity, the courts “are not at liberty to disregard the natural import of words with a view towards making the statute express an intention which is different from its plain meaning.” Fikar v. Montgomery County, 333 Md. 430, 434-435, 635 A.2d 977 (1994), quoting Potter v. Bethesda Fire Department, 309 Md. 347, 353, 524 A.2d 61 (1987).

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Applying these traditional rules of construction the following is apparent based on the plain language of the statute:

1. The Applicant may store materials outside;
2. The materials stored outside must be those normally carried in stock or used in or produced by the business;
3. The storage may not take place within 10 feet of any side or rear lot line;
4. The storage is effectively screened from the adjacent residential use or district.

The testimony was clear that the Applicant's storage meets or exceeds each of the criteria for outside storage set forth by the Code. Screening is provided to adjacent residential property by a large stand of evergreen trees (testimony of adjacent property owner (Mrs. Burdusi). All of the materials on outside display are stock items and no storage takes place within 10 feet of a rear or side lot line.

While the language of Section 267-26(E)(1) is clear and easily determined, the language of Section 267-39(C)(6)(a) is less clear. While "incidental" display outside is allowed, the legislative body has provided no guidance regarding the statutory meaning of "incidental"

Absent statutory guidance, fundamental canons of statutory construction are applied in determining the legislative intent. The enactment will be read in a natural and sensible fashion, assigning the words of the statute their ordinary and commonly understood meanings, absent evidence that the legislative body intended a different meaning Board of Trustees of Maryland State Retirement and Pension Systems v. Hughes, 340 Md. 1,7,664 A.2d 1250 (1995); *In Re Roger S.*, 338 Md. 385, 391 A.2d 696 (1995). This does not mean that the Court will give the word or words its generic meaning; rather, it requires that the Court give the word or words its "specific and commonly understood meaning in the eyes of the law." Baltimore County v. Wesley Chapel Bluemont Ass'n, 110 Md. App. 585, 601, 678 A.2d 100 (1996).

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Upon questioning, Mr. Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning attempted to define “incidental use”. Although clearly struggling to arrive at a definition, Mr. McClune ultimately concluded that a three prong test should be applied. First, the materials stored outside must be displayed “temporarily”; secondly, the store must have adequate space to store the merchandise inside and, thirdly, outside storage should occupy no more than 20% of the total square footage of the store. Additionally, Mr. McClune stated that a dictionary definition of the word, “incidental”, is “subordinate, nonessential, chance or minor circumstances, minor items, etc.” (Page 5, Dept. Staff Report).

The Applicant has provided further guidance regarding the meaning of the words, “incidental” and “incidental use”. *Black’s Law Dictionary*, Fifth Edition, 1982, defines “incidental” as “[D]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed principal; something incidental to the main purpose.” *Black’s* defines “incidental use” as follows: “[i]n zoning, use of premises which is dependent on or affiliated with the principal use of such premises.”

The first question, then, is not what is being sold (for it is indisputable that the primary purpose of a retail hardware store is to sell items similar or identical to those on display outside of Applicant’s store), but rather, whether the location of those sales items is “incidental” to the primary location of sale (i.e. the enclosed store). It is clear that the primary location from which the Applicant sells his merchandise is from within his rented space at Cross Roads Station. A rather insignificant number of items are placed on daily display for easy perusal by customers who both patronize Courtland or who may be present at the shopping center for other reasons. These items are not permanently on display, in fact they are sold, replaced, rotated or otherwise changed rather frequently. They are not permanently stored outside as they are moved inside each night. The Applicant testified that such outside displays are a necessary part of the retail hardware business and produced uncontradicted evidence that such displays occur with regularity and often with far more intensity at other hardware store throughout the County.

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The photographs produced by the Applicant and those produced by the Department of Planning and Zoning, depict accurately the outside display of merchandise at this location. An examination of those photographs shows a neat display of a variety of items being offered for sale. The sidewalk is not blocked and there is fire and easy access for pedestrians entering the store from the parking areas or adjacent stores. None of the evidence presented depicts an unsightly, unsafe or unsanitary display of these items. No fire lane was blocked. The evidence indicates that this area is not visible from adjacent residential lots due to substantial evergreen plantings to the side and MD Route 152 to the front. Such displays are a necessary ingredient of the retail hardware business. The Code does not prohibit outside display of merchandise in the B1 district. In short, the Hearing Examiner finds that the outside, display of merchandise as depicted in the record of this case is an “incidental” use and is permitted under the applicable Code provisions.

Such a decision, however, does not offer any guidance to the retail merchant as to when a particular use would, in fact, cease to be incidental and become a non-permitted display. As guidance, the Hearing Examiner offers the following parameters upon which this decision is based:

1. Outside display of merchandise is permitted in the B1 District.
2. The merchandise must be items normally carried in stock by the merchant and normally associated with the type of retail sales conducted by the particular merchant.
3. The items must be displayed in a manner that does not block sidewalks or impede normal pedestrian flow.
4. The merchandise must be displayed in a manner that does not block fire lanes or handicap access including ramps. Sufficient sidewalk space must be maintained for ingress and egress of handicapped persons including wheelchairs.
5. The display of these items must be temporary and must be removed after business hours to inside storage.

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- 6. No merchandise will be displayed within 10 feet of a side or rear yard setback**
- 7. Merchandise displayed outside must be adequately screened from view of adjacent residential properties.**
- 8. Merchandise must be displayed in a safe manner with all precautions taken to avoid injury to passersby.**
- 9. No outside cash register will be utilized for sale of any item, whether displayed inside or outside.**

There is, however, one other item which the Hearing Examiner has not addressed. Evidence indicated that Courtland also has a permanent installation to the rear of the building where propane tanks are filled. Testimony indicated that cars drive up to this area and have small propane tanks refilled from a permanently located “feed tank”. This “feed” tank is permanently located to the rear of the building in a fenced compound. Attachment 8G to the Department’s Staff Report depicts a fenced area with a large sign (sign is taller than the fence), a small building or shed, numerous small propane tanks, the large “feed tank” and other unidentifiable items. The record does not indicate that any permit was obtained for this installation nor do the approved site plans indicate this is an area of outside storage for propane and related items. This propane installation does not fall within the definition enunciated above and fails to meet the criteria for “incidental use” outlined by the Hearing Examiner above. It is not temporary and is, in fact, the primary (indeed the only) location for sale of propane. It is not removed at night and, according to the testimony of the adjacent property owner, often creates sickening odors that adversely impact the use and enjoyment of her property. In the opinion of the Hearing Examiner, this particular propane installation is not an incidental use within the meaning of the Harford County Code and is prohibited by Section 267-39(C)(6)(b).

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In conclusion, the Hearing Examiner recommends that the Board find that the storage and sale of propane by the Applicant is not a permitted use within the B1 District and is not an “incidental” use as permitted by the Harford County Code. The Hearing Examiner also recommends that the Board find that the sidewalk display of merchandise by Courtland Hardware is a permitted “incidental” display. Additionally, to avoid future ambiguity, the Hearing Examiner recommends that future outside displays of merchandise by the Applicant be subject to the following conditions:

1. The items displayed for sale in an outside area must be items normally carried in stock by the Applicant and are normally associated with the type of merchandise sales conducted by the Applicant.
2. The items on outside display must not be displayed in a manner that impedes pedestrian flow on the sidewalk or ingress or egress to Applicant’s or other retail stores from the parking area.
3. That items on outside display not block fire lanes or handicap access areas. Sufficient space must be maintained on the sidewalk to provide complete accessibility for handicapped individuals including wheelchairs.
4. That merchandise on outside display be removed to the interior of the building or the enclosed breezeway after business hours.
5. That all items displayed for sale outside be displayed in a neat, orderly and safe manner with adequate precautions taken to protect passersby from injury.
6. That no outside check out or cash register be used.
7. That all merchandise on outside display be screened from the view of adjacent residential uses.

Date December 22, 1998

William F. Casey
Zoning Hearing Examiner